Supreme Court, U.S.
FILED

No. 011578 APR 22 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MEDICAL ASSURANCE OF WEST VIRGINIA, INC.,
Petitioner,

v.

EVANGELINE C. PIZARRO, M.D.; COLUMBO AND STUHR, P.L.L.C.,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED

May the courts of West Virginia, on public policy grounds, refuse to enforce an arbitration clause that is otherwise enforceable under the Federal Arbitration Act?

LIST OF PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE

Medical Assurance of West Virginia, Inc. ("Medical Assurance") - Petitioner (Defendant/Appellant)

> Medical Assurance of West Virginia, Inc. is a West Virginia stock insurance corporation. Medical Assurance, Inc., a Delaware holding corporation, owns 100% of the stock of Medical Assurance of West Virginia, Inc. ProAssurance Corporation, a Delaware holding corporation that is publicly traded on the New York Stock Exchange, owns 100% of the stock of Medical Assurance, Inc.

Evangeline C. Pizarro, M.D. ("Dr. Pizarro") - Respondent (Plaintiff/Appellee)

Colombo & Stuhr, PLLC ("Colombo & Stuhr") - Respondent (Defendant/Appellee)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

STATUTE INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 2

ARGUMENT 6

THE WEST VIRGINIA COURTS ERRED BY REFUSING, BASED ON PUBLIC POLICY, TO ENFORCE A VALID WRITTEN ARBITRATION AGREEMENT THAT IS OTHERWISE ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT 6

CONCLUSION 10

APPENDIX ..... App. i

TABLE OF AUTHORITIES

Page(s)

Cases:

Allied-Bruce Terminix Co., Inc. v. Dobson,
513 U.S. 265, 115 S.Ct. 834,
130 L.Ed.2d 753 (1995) 9, 10

American Home Assurance Co. v.
Vecco Concrete Constr. Co., Inc.,
629 F.2d 961 (4th Cir. 1980) 6

American Recovery Corp. v.
Computerized Thermal Imaging, Inc.,
96 F.3d 88 (4th Cir. 1996) 7

Bernhardt v. Polygraphic Co.,
350 U.S. 198, 76 S.Ct. 273 (1956) 6-7

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213, 105 S.Ct. 1238,
84 L.Ed.2d 158 (1985) 9

Elmore v. State Farm Mut. Auto. Ins. Co.,
202 W.Va. 430, 504 S.E.2d 893 (1998) 8

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 10

Green Tree Financial Corp.-Alabama v. Randolph,
531 U.S. 79 (2000) 10

Heinhaus v. Venute Assoc., Inc.,
959 F.2d 551 (5th Cir. 1992) 7

Mediterranean Enter., Inc. v. Ssangyong Corp.,
708 F.2d 1458 (9th Cir. 1983) 7

Montauk Oil Transp. Corp. v.
Steamship Mut. Underwriting Ass'n (Bermuda) Ltd.,
79 F.3d 295 (2nd Cir. 1996) 7

O'Neil v. Hilton Head Hosp.,
115 F.3d 272 (4th Cir. 1997) 8

Peoples Security Life Ins. Co. v.
Monumental Life Ins. Co.,
867 F.2d 809 (4th Cir. 1989) 7-8, 9

Shamblin v. Nationwide Mut. Ins. Co.,
183 W.Va. 585, 396 S.E.2d 766 (1990) 8

Southland Corp. v. Keating,
465 U.S. 1, 104 S.Ct. 852,
79 L.Ed.2d 1 (1984) 7, 9

Summit Health, Ltd. v. Pinhas,
500 U.S. 322, 111 S.Ct. 1842,
114 L.Ed.2d 366 (1991) 8

Statutes:

9 U.S.C. § 1, *et seq* 2

9 U.S.C. § 2 ..... i, 1, 3

28 U.S.C. §1257(a) 1

W.Va. Code § 33-11-1, *et seq* 4

W.Va. Code §53-1-1 5

Rules:

Sup. Ct. R. 13 6

W.V. R. App. P. 14(a) 5

W.V. R. App. P. 14(b) 5

OPINIONS BELOW

The Order refusing Medical Assurance's Petition for Writ of Prohibition, which was entered by the West Virginia Supreme Court of Appeals on January 23, 2002, is reprinted in the Appendix at page App. 1.

The Order denying Medical Assurance's Motion to Dismiss for lack of subject matter jurisdiction, which was entered by the Circuit Court of Ohio County, West Virginia on August 17, 2001, is reprinted in the Appendix beginning at page App. 3.

BASIS FOR JURISDICTION

The West Virginia Supreme Court of Appeals's Order denying Medical Assurance's Petition for Writ of Prohibition was entered on January 23, 2002. (App. 1) This Court has jurisdiction pursuant to *28 U.S.C. §1257(a).*

STATUTE INVOLVED IN THE CASE

Section 2 of the Federal Arbitration Act ("FAA") provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

STATEMENT OF THE CASE

West Virginia courts have refused to enforce a valid arbitration clause contained in Dr. Pizarro's medical professional liability policy issued by Medical Assurance (the "Policy"). The Policy requires that any claim by the insured against the insurer be resolved in accordance with the arbitration provisions of the Policy. This requirement is set forth in Section V, in which the parties agreed that "Any claim against us [Medical Assurance] shall be settled by arbitration as provided in Section XIII below."

Section XIII contains the parties' acknowledgment that the agreement "evidences a transaction involving interstate commerce" and that any dispute arising from or connected to the Policy shall be submitted to binding arbitration. Specifically, Section XIII, entitled Arbitration states, in pertinent part:

> Both the insured and we acknowledge that this agreement evidences a transaction involving interstate commerce. Any dispute, claim or controversy arising out of, relating to or in connection with the policy, its subject matter or its negotiation, as to the existence, validity, interpretation, performance, non-performance, enforcement, operation, breach of contract, breach of warranty, continuance or termination thereof or any claim alleging fraud, deceit, or suppression of any material fact or breach of fiduciary duty shall be submitted to binding arbitration in accordance with Title 9 U.S.C. § 1, et seq. . . .The provisions hereof shall be a complete defense to any suit, action, or proceeding inany federal, state or local court or before any administrative tribunal with respect to any dispute, claim or controversy arising under the policy.

Dr. Pizarro and Medical Assurance also agreed in Section XIV of the Policy that the arbitration provisions of the Policy are governed by the FAA. Section XIV states:

> The policy shall be construed, and the legal relations between us and the insureds (and anyone claiming under the insureds) shall be determined, in accordance with the laws of the state in which the address of the policyholder, as specified in the Coverage Summary, is located, except that the Federal Arbitration Act (Title 9 of the United States Code) shall apply to the rights and obligations of the parties to submit any dispute, claim or controversy arising under the policy to arbitration, as provided in Section XIII above.

The Policy was issued in 1998 and obligates Medical Assurance to provide a defense to and indemnify Dr. Pizarro for medical malpractice claims made against her prior to the retroactive date identified in the Policy, provided such claims are reported to Medical Assurance during the policy period. The Policy sets limits of $1,000,000 per claim and was issued to Dr. Pizarro at her Wheeling, West Virginia, office address. While her primary office is located in West Virginia, Dr. Pizarro also provided medical services to patients at the Bellaire Medical Center in Belmont County, Ohio, two days a week, and the Policy covered claims made against her arising from treatment in both states.

Deloris and Ralph Young sued Dr. Pizarro for medical malpractice in Belmont County, Ohio in December 1998. This action will be referenced as the "Medical Lawsuit." The Youngs alleged that Dr. Pizarro and other healthcare providers negligently treated Deloris Young at the Bellaire Health Center in Bellaire, Ohio. Medical Assurance retained Columbo & Stuhr to defend Dr. Pizarro in the Medical Lawsuit.

The Medical Lawsuit proceeded to trial and resulted in a jury verdict against Dr. Pizarro for compensatory damages of $7.5 million. The Medical Lawsuit is currently pending and has not been resolved on appeal.

Dr. Pizarro filed suit against Medical Assurance in the Circuit Court of Ohio County, West Virginia, on September 9, 2000, approximately two weeks after the jury verdict in the Medical Lawsuit. In the suit (the "Bad Faith Lawsuit"), Dr. Pizarro alleged that she sustained damages because Medical Assurance failed to settle the Medical Lawsuit within policy limits and that this failure violated Medical Assurance's duty to deal in good faith under the Policy. Dr. Pizarro also claimed that Medical Assurance's actions violated provisions of West Virginia's Unfair Trade Practices Act ("UTPA"), *W.Va. Code § 33-11-1, et seq.* Dr. Pizarro later asserted claims against Columbo & Stuhr in the same action.

Medical Assurance filed a Motion to Dismiss the Bad Faith Lawsuit. A copy of the Motion to Dismiss is contained in the Appendix at pages App. 6-8. In its Motion, Medical Assurance advised the court that the arbitration provisions contained in the policy were enforceable under the FAA and thus required arbitration of the dispute. In support of its Motion, Medical Assurance submitted a Memorandum of Law which demonstrated that the FAA was applicable because the policy of insurance evidenced a transaction involving interstate commerce and contained a written agreement to settle disputes arising from the contract by arbitration. The Memorandum of Law further demonstrated that all of Dr. Pizarro's claims arose from, related to and are in connection with the Policy and that, under the FAA, the arbitration provision must be enforced and any contrary state law or policy was preempted. Medical Assurance asked the circuit court to dismiss the action based on the applicability of the arbitration provisions and the court's resulting lack of subject matter jurisdiction.

The circuit court denied Medical Assurance's Motion to Dismiss in an Order dated August 17, 2001. (App. 3-5) While the circuit court failed to mention the FAA

specifically in its Order, the circuit court impliedly recognized the applicability of FAA by acknowledging the presence of the arbitration provision in the Policy and constructing its ruling in such a way as to avoid yielding to the mandates of the FAA. Instead of dismissing Dr. Pizarro's claims as required by the FAA, the circuit court wrote that it is against public policy for an insurer to include an arbitration provision in its insurance policies. (App. 5) The circuit court also found that the arbitration provision did not govern the Bad Faith Lawsuit. In reaching these conclusions, the circuit court conceded that the scope of the arbitration provision was quite broad. (App. 4) The court also acknowledged that Dr. Pizarro's claims "would not exist but for the insurance policy." (App. 4) If the circuit court was correct that the arbitration provision did not govern Dr. Pizarro's claims, it would be unnecessary for the circuit court to also find that the arbitration provision violated public policy. The inconsistent positions taken by the circuit court indicate an attempt to dispose of Medical Assurance's Motion to Dismiss without directly implicating the FAA because the circuit court recognized that if the FAA was implicated, the circuit court would lose subject matter jurisdiction over Dr. Pizarro's claims and would be required to grant Medical Assurance's Motion to Dismiss.

In response to the circuit court's order, Medical Assurance filed a Petition for Writ of Prohibition in the West Virginia Supreme Court of Appeals.[1] (App. 9-18) Medical Assurance asserted that the circuit court abused its authority and exceeded its legitimate powers when it retained jurisdiction over the Bad Faith Lawsuit. Medical Assurance argued that circuit court's Order was improper because:

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[1] In West Virginia, a Petition for Writ of Prohibition falls within the West Virginia Supreme Court of Appeals' original jurisdiction. *See, W.Va. Code* §53-1-1 (2000 Replacement Vol.); *West Virginia Rules of Appellate Procedure* Rule 14(a). The West Virginia Supreme Court of Appeals has discretion reject a Petition for Writ of Prohibition by determining not to grant a rule to show cause. *West Virginia Rules of Appellate Procedure* Rule 14(b).

1. The ruling permitted a civil action to proceed in the absence of subject matter jurisdiction;

2. The court refused to enforce a valid arbitration provision; and

3. The ruling ignored the applicability of the FAA, which requires the enforcement of arbitration agreements contained in contracts involving interstate commerce, as the contract between Dr. Pizarro and Medical Assurance did.

(App. 10-11)

The West Virginia Supreme Court of Appeals refused Medical Assurance's Petition for Writ of Prohibition without discussion by order dated January 23, 2002. (App. 1). This Petition was filed within 90 days of the entry of the order, in accordance with Supreme Court Rule 13.

ARGUMENT

THE WEST VIRGINIA COURTS ERRED BY REFUSING, BASED ON PUBLIC POLICY, TO ENFORCE A VALID WRITTEN ARBITRATION AGREEMENT THAT IS OTHERWISE ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT.

Dr. Pizarro's Policy contains a valid and enforceable arbitration clause. The Policy meets the two requirements established by this Court for preemption of state law and enforcement under the FAA. The Policy contains a written agreement between the parties to arbitrate contractual disputes, and the contract reflects a transaction involving interstate commerce. *American Home Assurance Co. v. Vecco Concrete Constr. Co., Inc.*, 629 F.2d 961, 963 (4th Cir. 1980) (citing *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 76 S.Ct. 273

(1956) for prerequisites for application of FAA); *see also, Southland Corp. v. Keating*, 465 U.S. 1, 11, 104 S.Ct. 852, 858, 79 L.Ed.2d 1 (1984).

The written arbitration agreement is set forth in full in Section XIII of the Policy, and is also referenced in Sections V and XIV. There is no dispute that the Section XIII of the Policy contains a broadly worded contract to arbitrate that encompasses:

> [a]ny dispute, claim or controversy arising out of, relating to or in connection with the policy, its subject matter or its negotiation, as to the existence, validity, interpretation, performance, non-performance, enforcement, operation, breach of contract, breach of warranty, continuance or termination thereof...

Where a contract, including a contract of insurance, contains an arbitration clause, the arbitration clause is not limited to a literal interpretation of the terms of the contract, but extends to all claims having a significant relationship to the contract. *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88 (4th Cir. 1996); *Montauk Oil Transp. Corp. v. Steamship Mut. Underwriting Ass'n (Bermuda) Ltd.*, 79 F.3d 295 (2nd Cir. 1996) (enforcing compulsory arbitration provision in policy of insurance); *Heinhaus v. Venute Assoc., Inc.*, 959 F.2d 551, 553-54 (5th Cir. 1992) (holding that parties to an excess insurance policy, which incorporated by reference the underlying insurance policy, were bound by the arbitration clause contained in the underlying policy). Claims for breach of fiduciary duty are proper subjects of arbitration where the contract contains a clause requiring arbitration of any dispute arising under the contract. *Mediterranean Enter., Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983). Federal law does not limit arbitrable disputes to those specifically set forth in the contract, but extends to claims relating to the validity of the contract, statutory claims, and common law claims. *See, Peoples Security Life*

Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809 (4th Cir. 1989); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997).

As the trial court below correctly noted, none of Dr. Pizarro's claims would exist but for the Policy. (App. 4). Her claim for alleged breach of the implied covenant of good faith and fair dealing arising from the Policy cannot be separated from the Policy. *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990); *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 435, 504 S.E.2d 893, 898 (1998). Similarly, her UTPA claims turn on Medical Assurance's performance under the Policy and cannot be separated from it. Therefore, Dr. Pizarro's claims must be arbitrated in accordance with the Policy.

The Policy also meets the FAA's requirement that the contract must involve interstate commerce if arbitration is to be compelled. This is evident from the facts of the case. The Policy was issued in West Virginia and provided coverage to Dr. Pizarro whether she was treating patients in West Virginia or Ohio. Dr. Pizarro's claims arise from Medical Assurance's handling of a claim asserted against her in Ohio, based on medical treatment rendered at a facility in Ohio. The Medical Lawsuit is being litigated in Ohio, and if a judgment or settlement is paid in the Medical Lawsuit, the payment will be made to an Ohio resident. Because Dr. Pizarro regularly practices medicine in Ohio, the funds used to pay her insurance premiums were undoubtedly derived at least in part by the provision of services to out of state residents. Where services are regularly performed for out-of-state patients and revenue is generated from out-of-state sources, a matter is deemed to affect interstate commerce. *See Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 329-330, 111 S.Ct. 1842, 1847, 114 L.Ed.2d 366 (1991).

Additionally, the parties to the contract agreed that the Policy involved interstate commerce. The Policy states that "Both the insured and we acknowledge that this agreement evidences a contract involving interstate commerce."

When the requirements of a written contract to arbitrate and the involvement of interstate commerce are met, the FAA governs, and any contrary state law or policy

is preempted. *Southland*, 465 U.S. at 15-16, 104 S.Ct. at 860-861; *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 272, 115 S.Ct. 834, 838, 130 L.Ed.2d 753 (1995).

In this instance, the West Virginia courts are required to "vigorously enforce" the arbitration agreement between Dr. Pizarro and Medical Assurance in order to carry out the underlying policies of the FAA. *Peoples Security Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 813 (4th Cir. 1989) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985)). The West Virginia courts have refused to do so, based on public policy. (App. 1, 3-5) Their refusal is in direct violation of the holding in *Allied-Bruce Terminix*, in which this Court wrote:

> We must decide in this case whether that Act [the FAA] used language about interstate commerce that nonetheless limits the Act's application, thereby carving out an important statutory niche in which a State remains free to apply its antiarbitration law **or policy**. We conclude that it does not.

Allied-Bruce Terminix Co., 513 U.S. at 273 (emphasis added). It also contradicts this Court's declaration that agreements governed by the FAA are enforceable in both federal and state courts. *Southland*, 465 U.S. at 14-15.

The West Virginia courts improperly invoked a previously unarticulated state public policy against arbitration provisions in insurance policies to void the arbitration agreement in the Policy. The West Virginia courts exceeded their legitimate authority and the scope of their jurisdiction when they ignored the FAA and other relevant federal law to reach their improper holding. The FAA requires enforcement of the arbitration provisions in the Policy. As this Court has announced unequivocally, "The basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Co.*, 513 U.S. at 270. Neither the FAA nor the case law interpreting it makes an exception

based on a state's public policy. *Id.* at 273. The orders of the West Virginia courts in this case undercut the very purpose of the FAA, which is "to reverse the longstanding judicial hostility to arbitration agreements ... and to place arbitration agreements upon the same footing as other contracts." *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 89 (2000) (*quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). Accordingly, those orders are due to be reversed.

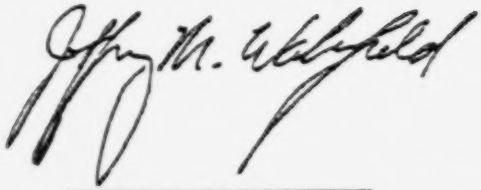
CONCLUSION

The West Virginia courts improperly refused to enforce a valid arbitration clause in the instant case based on public policy grounds. In doing so, they ignored this Court's holdings favoring a broad interpretation and application of the FAA. This Court has explicitly noted that state courts cannot refuse to enforce a valid arbitration clause based on public policy grounds, as the West Virginia courts have done. West Virginia's judicial hostility towards arbitration agreements should enjoy no deference in this Court. A state should not be permitted to disregard the FAA under either the guise of public policy or a distorted view of the contract in question.

The West Virginia courts have decided an important federal question in a way that conflicts with both federal law and decisions of this Court. For this reason and the others stated above, Medical Assurance respectfully requests that this Court accept review of this matter.

WHEREFORE, the Petitioner respectfully requests that a Writ of Certiorari be issued to the West Virginia Supreme Court of Appeals for the purpose of bringing before this Court for full briefing and review the West Virginia courts' decisions retaining jurisdiction and refusing to compel arbitration in this matter.

Respectfully submitted,
By Counsel



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APPENDIX TABLE OF CONTENTS

Page

Order of
The West Virginia Supreme Court
entered January 23, 2002 ..... App. 1

Order of
The Circuit Court of Ohio County
West Virginia
entered August 16, 2001 ..... App. 3

Defendant Medical Assurance of
West Virginia, Inc.'s Motion to Dismiss
Filed in The Circuit Court of Ohio County
West Virginia
filed November 3, 2000 ..... App. 6

Defendant Medical Assurance of
West Virginia, Inc.'s Petition for
Writ of Prohibition
filed December 17, 2001 ..... App. 9

STATE OF WEST VIRGINIA

No. 012571

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 23rd of January, 2002, the following order was made and entered:

State of West Virginia ex rel. Medical Assurance of West Virginia, Inc.,

Petitioner,

vs.)

Honorable Martin J. Gaughan, Judge of the Circuit Court of Ohio County, Evangeline C. Pizarro, M.D., and Colombo & Stuhr, PLLC,

Respondents.

On a former day, to-wit, December 17, 2001, came the petitioner, Medical Assurance of West Virginia, Inc., by Flaherty, Sensabaugh & Bonasso, Jeffrey M. Wakefield and Michelle Marinacci, its attorneys, and presented to the Court its petition and memorandum of law in support thereof, praying for a writ of prohibition to be directed against the respondents, the Honorable Martin J. Gaughan, Judge of the Circuit Court of Ohio County, Evangeline C. Pizarro, M.D., and Colombo & Stuhr, PLLC, as therein set forth. Thereafter, on the 11th day of January, 2002, came the respondent, Evangeline C. Pizarro, M.D., by Cassidy, Myers, Cogan, Voegelin & Tennant, Patrick S. Cassidy and Wray V. Voegelin, her attorneys, and presented to the Court her written response in opposition thereto.

Upon consideration whereof, the Court is of opinion that a rule should not be awarded and the writ prayed for by the petitioner is hereby refused.

A True Copy

Attest: /s/_____

Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

2001 AUG 17 AM 8 52
CIVIL ACTION NO. 00-C-1498

EVANGELINE C. PIZARRO, M.D.
Plaintiff,

vs.

MEDICAL ASSURANCE OF WEST VIRGINIA, INC. and
COLOMBO AND STUHR, PLLC,
Defendants.

Entered August 16, 2001

ORDER

Now before this Court is the Motion to Dismiss of Defendant Medical Assurance of West Virginia, Inc. ("Medical Assurance"). Specifically, Medical Assurance asserts that this Court lacks subject matter jurisdiction over this action due to the existence of an arbitration provision contained in the medical professional liability policy ("insurance policy") which it issued to Plaintiff Evangeline C. Pizarro, M.D. ("Dr. Pizarro").

The Court has considered Medical Assurance's motion, the memorandum of law submitted by both parties, the parties' oral arguments, and other pertinent legal authorities. For the following reasons, the Court finds that the arbitration provision contained in the insurance policy does not govern the instant action, and therefore, Dr. Pizarro may litigate her claims against Medical Assurance in this Court.

Findings:

The arbitration provision in question provides that disputes "arising out of, relating to or in connection with the policy, its subject matter or its negotiation . . . shall be submitted to binding arbitration." This Court recognizes that the term "arising out of" coupled with "relating to or in connection with" in an arbitration provision has the effect of broadening the scope of that provision. See, e.g., American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996). Nonetheless, issues raised by a party subject to such a provision must still fall squarely within the reach of the parties' underlying contractual agreement in order for the arbitration provision to control. See, e.g., Midwest Mechanical Contractors, Inc. v. Commonwealth Constr. Co., 801 F.2d 748 (5th Cir. 1986).

The Court finds that Dr. Pizarro's common law and statutory bad faith tort claims are simply not within the reach of the insurance policy. To fall within its reach, Dr. Pizarro's claims would, at minimum, have to raise a question, the resolution of which would require reference to or interpretation of some portion of the insurance policy itself with regard to the rights of the parties under the policy. Here, Dr. Pizarro is alleging that Medical Assurance breached duties imposed on it by law to deal fairly and in good faith in settling any claims filed against her in connection with her medical practice. Dr. Pizarro is not alleging that Medical Assurance failed to perform any obligations owed to her under the language of the insurance policy.

This Court also finds that, notwithstanding the fact that Dr. Pizarro's claims would not exist but for the insurance policy, this fact alone is not enough to characterize the instant dispute as "arising out of, relating to or in connection with" the insurance policy.

In reaching the foregoing conclusions, this Court adopts the views already expressed on these matters by

several jurisdictions. See, Armada Coal Export, Inc. v. Interbulk, Ltd., 726 F.2d 1566 (11th Cir. 1984); Hersman, Inc. v. Fleming Companies, Inc., 19 F.Supp.2d 1282 (M.D. Ala. 1998), aff'd, 180 F.3d 271 (11th Cir. 1999); Dusold v. Porta-John Corp., 807 P.2d 526 (Ariz. Ct. App. 1990); Terminix Int'l Co., L.P. v. Michaels, 668 So.2d 1013 (Fla. Dist. Ct. App. 1996).

This Court further finds that it is against public policy for an insurance company to insert an arbitration provision into its policies, the effect of which eradicates an individual's statutorily-created rights. In West Virginia, an insured has a private cause of action against her insurer for breach of its general legal duty to deal fairly and in good faith in settling claims against her. See W.Va. Code § 33-11-4(9) (2000). This Court believes that Dr. Pizarro's statutory right to sue Medical Assurance for breach of its legal duty would effectively be defeated if the arbitration provision controlled this dispute. Cf. Wheeling-Pittsburgh Steel Corp. v. Rowing, 517 S.E.2d 763 (W.Va. 1999); Copley v. NCR Corp., 394 S.E.2d 751 (W.Va. 1990).

Accordingly, it is hereby **ORDERED** that Defendant Medical Assurance's Motion to Dismiss for lack of subject matter jurisdiction is DENIED.

It is further **ORDERED** that the Circuit Clerk shall forward attested copies of the Order to all parties of record.

ENTER the 16th day of August, 2001.

/s/
MARTIN J. GAUGHAN, JUDGE
First Judicial Circuit

A copy, Teste
/s/
Circuit Clerk

IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

CIVIL ACTION NO. 00-C-1489(G)
(Judge Gaughan)

EVANGELINE C. PIZARRO, M.D.,
Plaintiff,

VS.

MEDICAL ASSURANCE OF WEST VIRGINIA, INC., WILLIAM A. DAVIS, ESQ. and COLOMBO AND STUHR, P.L.L.C.,
Defendants.

MOTION TO DISMISS OF MEDICAL ASSURANCE OF WEST VIRGINIA, INC.

COMES NOW the defendant, Medical Assurance of West Virginia, Inc. ["Medical Assurance"], by counsel, and moves the Court, pursuant to the provisions of Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure, for the entry of an order dismissing the above-captioned civil action as to Medical Assurance on the ground that this Court lacks jurisdiction of the subject matter of this action and the Amended Complaint fails to state a claim upon which relief may be granted.

In further support of said motion, Medical Assurance states:

1. On or about September 19, 2000, the plaintiff, Evangeline C. Pizarro, M.D. ["Dr. Pizarro"], filed her Complaint. Dr. Pizarro asserted claims against Medical Assurance in Counts I, II, III and IV. Counts I, II and III contain claims emanating from the decision of the West Virginia Supreme Court of Appeals in Shamblin v. Nationwide Mut. Ins. Co., 183 W.Va. 585, 396 S.E.2d 766

(1990). Count IV asserts a claim under the West Virginia Unfair Trade Practices Act ["UTPA"], W.Va. Code §§ 33-11-1, et seq.[1]

2. Dr. Pizarro subsequently filed and served an Amended Complaint. The allegations against Medical Assurance do not differ from the original Complaint.

3. Dr. Pizarro's action has as its gensis an underlying medical professional liability suit pending in the Court of Common Pleas of Belmont County, Ohio in which Dr. Pizarro is a named defendant. The underlying medical professional liability action proceeded to trial on August 22, 2000 and a jury verdict was returned against Dr. Pizarro and another defendant on August 25, 2000 in the total amount of $7.5 million. See Amended Complaint, ¶ 14. Following the verdict, the plaintiffs in the underlying medical professional liability action have filed a motion for prejudgment interest. Id., ¶ 15. Additionally, post-verdict motions have been filed on behalf of Dr. Pizarro which remain unresolved.

4. Medical Assurance asserts that the Amended Complaint fails to state a cause of action upon which relief may be granted relative to Counts I, II and III in that there is not a final, non-appealable judgment of record in the Court of Common Pleas of Belmont County, Ohio which would result in their being any personal exposure to Dr. Pizarro. The underlying medical professional liability action has not been resolved and is currently the subject of various post-verdict motions. Unless and until the underlying medical professional liability action is resolved in a manner which results in a final and non-appealable judgment against Dr. Pizarro for an amount in excess of the available medical professional liability coverage, the claims asserted in Counts I, II and III are premature in that Dr. Pizarro does not face any personal exposure at this time.

---

[1] Count V in the original Complaint states a legal malpractice claim against William A. Davis.

5. Count IV of the Amended Complaint fails to state a cause of action upon which relief may be granted in that the facts alleged do not fall within any provisions of the UTPA and none are cited in the Amended Complaint.

6. Additionally, this Court lacks subject matter jurisdiction over the Amended Complaint filed against Medical Assurance because any dispute between Dr. Pizarro and Medical Assurance is subject to binding arbitration in accordance with Title 9 U.S.C. § 1, et seq. (the United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association. Specifically, ¶ XIII of the General Conditions of the medical professional liability policy issued to Dr. Pizarro, being Policy No. MP26607, contains a valid and enforceable arbitration clause.

WHEREFORE, for the reasons stated above, Medical Assurance of West Virginia, Inc. prays that its motion be granted together with such other and further relief as the Court may deem proper.

MEDICAL ASSURANCE OF WEST VIRGINIA, INC.,
By Counsel,

/s/

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IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

No. 012571
Upon original jurisdiction in prohibition,

STATE OF WEST VIRGINIA, EX REL. MEDICAL ASSURANCE OF WEST VIRGINIA, INC.,
Petitioner,

v.

THE HONORABLE MARTIN J GAUGHAN, JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY; EVANGELINE C. PIZARRO, M.D.; and COLOMBO & STUHR, PLLC,
Respondents.

PETITION FOR WRIT OF PROHIBITION

COMES NOW the Petitioner, Medical Assurance of West Virginia, Inc. ["Medical Assurance"], by counsel, and petitions this Honorable Court to award a Writ of Prohibition against the respondents, the Honorable Martin J. Gaughan ["Judge Gaughan"], in his official capacity as Judge of the Circuit Court of Ohio County, West Virginia, Evangeline C. Pizarro, M.D. ("Dr. Pizarro") and Colombo & Stuhr, PLLC ["Colombo & Stuhr"].

STATEMENT OF JURISDICTION

1. This Petition for Writ of Prohibition is filed pursuant to Article 8, Section 3 of the Constitution of West Virginia, granting the Supreme Court of Appeals original jurisdiction in prohibition, and pursuant to West Virginia Code § 53-1-1 (2000 Replacement Vol.). This Petition is also filed under the provisions of Rule 14(a) of the West Virginia Rules of Appellate Procedures.

2. Pursuant to the original jurisdiction of this Court, Medical Assurance seeks relief in the form of a Writ of Prohibition on the basis that Judge Gaughan exceeded his legitimate power by entering an Order on August 17, 2001 denying Medical Assurance's Motion to Dismiss Plaintiff's Complaint for lack of subject matter jurisdiction. See Exhibit "A."

3. "[P]rohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.Va. Code § 53-1-1 (2000 Replacement Vol.); Syl. Pt. 4, State ex rel. Jeanette H. v. Pancake, 207 W.Va. 154, 529 S.E.2d 865 (2000); Syl. Pt. 1, State ex rel. Means v. King, 205 W.Va. 708, 520 S.E.2d 875 (1999).

4. A Writ of Prohibition will lie where the abuse of power is so flagrant and violative of a Petitioner's rights so as to make the remedy of appeal inadequate. State ex rel. UMWA International Union v. Maynard, 176 W.Va. 131, 342 S.E.2d 96 (1985).

5. Prohibition is an appropriate remedy in instances where, as here, a trial court permits a civil action to proceed in the face of an arbitration provision in a contract between the parties. See State ex rel Center Designs, Inc. v. Henning, 201 W.Va. 42, 491 S.E.2d 42 (1997); Baker Mine Service, Inc. v. Nutter, 171 W.Va. 770, 301 S.E.2d 860 (1983); State ex rel Ranger Fuel Corp. v. Lilly, 165 W.Va. 98, 267 S.E.2d 435 (1980).

6. Medical Assurance asserts that Judge Gaughan's ruling in the August 17, 2001 Order constitutes an abuse of authority and exceeds the court's legitimate powers for the following reasons:

(a) the ruling permits a civil action to proceed notwithstanding the absence of subject matter jurisdiction in the Circuit Court of Ohio County, West Virginia;

(b) the ruling declines to enforce a valid and enforceable arbitration provision existing in a contract of insurance between Medical Assurance and Dr. Pizarro;

(c) the ruling runs afoul of the provisions of federal law, specifically the provisions of the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ["FAA"], which preempt state law and require enforcement of arbitration agreements contained in contracts involving interstate commerce.

7. A Writ of Prohibition is appropriate and the only available remedy for Medical Assurance in this case for the following reasons, to-wit:

(a) the error committed by the Circuit Court is substantial, clear-cut and plainly in violation of federal law which preempts state law;

(b) the error committed by the Circuit Court may be resolved independently of any disputed facts;

(c) appeal is not an adequate remedy because the error will not be corrected until after the litigants, lawyers and the court have expended substantial effort and resources in handling a matter over which the Circuit Court has no subject matter jurisdiction;

(d) there is a high probability that the Circuit Court will be reversed.

PARTIES

8. Medical Assurance is a West Virginia corporation authorized to do business and to issue medical professional liability insurance policies in West Virginia. Medical Assurance issued a medical professional liability policy, being policy number MP26607, to Dr. Pizarro which provided coverage to Dr. Pizarro for claims asserted by Deloris and Ralph Young in the Court of Common Pleas of Belmont County, Ohio. Medical Assurance is currently a defendant in a civil action pending in the Circuit Court of Ohio County, West Virginia, being Civil Action No. 00-C-

1489(G), which was filed by Dr. Pizarro and which arises from Medical Assurance's handling of the Youngs' claims against Dr. Pizarro.

9. Judge Gaughan is a duly elected Circuit Court Judge in the First Judicial Circuit, and is the presiding Judge in Civil Action No. 00-C-1489(G).

10. Dr. Pizarro is a Medical Assurance insured and the named plaintiff in the civil action pending in the Circuit Court of Ohio County, West Virginia, being Civil Action No. 00-C-1489(G).

11. Colombo & Stuhr, PLLC ["Colombo & Stuhr"] is a professional limited liability company existing under the laws of the State of West Virginia engaged in the practice of law. It is a named defendant in Civil Action No. 00-C-1489(G) which arises from Colombo & Stuhr's representation of Dr. Pizarro relative to the Youngs' claims against Dr. Pizarro.

FACTUAL BACKGROUND

12. On or about January 7, 1998, Medical Assurance issued a medical professional liability policy ["the policy"], being policy number MP26607, to Pizarro & Pizarro, M.D.'s, 2115 Chapline Street, Suite 201, Wheeling, West Virginia 26003. Dr. Pizarro is a named insured under the policy. See Exhibit "B."

13. The policy has a retroactive coverage date to July 1, 1992 and obligates Medical Assurance to provide a defense to and indemnify Dr. Pizarro (up to the policy limits of $1,000,000 per claim) for medical professional liability claims.

14. The policy additionally contains the following provisions relative to disputes arising between Dr. Pizarro and Medical Assurance:

GENERAL CONDITIONS

V. CLAIMS AGAINST US

No claim shall lie against us unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of the policy, nor until the amount of any insured's obligation to pay shall have been finally determined either by judgment against an insured after actual trial or by written agreement of such insured, the claimant, and us. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under the policy to the extent of the insurance afforded by the policy. No person or organization shall have any right under the policy to join us as a party to any action against an insured to determine the insured's liability, nor shall we be impleaded by an insured or his legal representative. Bankruptcy or insolvency of any insured or any insured's estate shall not relieve us of any of our obligations hereunder. Any claim against us shall be settled by arbitration as provided in Section XIII below.

* * *

XIII. ARBITRATION

Both the insured and we acknowledge that this agreement evidences a transaction involving interstate commerce. Any dispute, claim or controversy arising out of, relating

to or in connection with the policy, its subject matter or its negotiation, as to the existence, validity, interpretation, performance, non-performance, enforcement, operation, breach of contract, breach of warranty, continuance or termination thereof or any claim alleging fraud, deceit, or suppression of any material fact or breach of fiduciary duty shall be submitted to binding arbitration in accordance with Title 9 U.S.C. § 1, et seq. (The United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association. Such arbitration proceedings may be initiated by either party by notice in writing to the other and to the American Arbitration Association. Each party to arbitration shall bear its own arbitration costs and expenses. However, in the event any party is required to file a petition or commence any such other proceeding to compel arbitration, the arbitrator may award that party reasonable attorney's fees and costs incurred in having to bring such action. The arbitrator shall have the discretion to order a pre-hearing exchange of information by the parties, including, without limitation, production of requested documents, exchanging of summaries of testimony of proposed witnesses, and examination by deposition of parties. Notwithstanding contrary state law or regulation, the arbitrator shall have the authority to award any remedy or relief allowed under the provisions of the United States Arbitration Act, including, without limitation, specific performance of any obligation created under the policy, the

awarding of punitive damages, the issuance of an injunction, or the imposition of sanctions for abuse or frustration of the arbitration process. Any arbitration award shall be in writing and shall specify the factual and legal bases of the award. Judgment on the award rendered by the arbitrator shall be final and may be entered in any court having jurisdiction thereof. The provisions hereof shall be a complete defense to any suit, action, or proceeding in any federal, state or local court or before any administrative tribunal with respect to any dispute, claim or controversy arising under the policy. (Emphasis added.)

XIV. GOVERNING LAW

The policy shall be construed, and the legal relations between us and the insureds (and anyone claiming under the insureds) shall be determined, in accordance with the laws of the state in which the address of the policy-holder, as specified in the Coverage Summary is located, except that the Federal Arbitration Act (Title 9 of the United States Code) shall apply to the rights and obligations of the parties to submit any dispute, claim or controversy arising under the policy to arbitration, as provided in Section XIII above. (Emphasis added.)

15. On December 30, 1998, Deloris and Ralph Young instituted a civil action against Dr. Pizarro and other healthcare providers in the Court of Common Pleas of Belmont County, Ohio, being Case No. 98-CV-00388, alleging claims of medical professional negligence arising

during Dr. Pizarro's treatment of Deloris R. Young at the Bellaire Health Center in Bellaire, Ohio ["the underlying action"]. See Exhibit "C."

16. Pursuant to the insurance contract, Medical Assurance retained the law firm of Colombo & Stuhr to defend Dr. Pizarro in the underlying action.

17. The underlying action against Dr. Pizarro proceeded to trial on August 22, 2000 and resulted in a jury verdict being returned on August 25, 2000 against Dr. Pizarro for compensatory damages totaling $7.5 million. A motion for prejudgment interest filed by the Youngs in the underlying action was granted by the trial court and the trial court further denied various post-verdict motions filed on behalf of Dr. Pizarro. An appeal bond has been posted on behalf of Dr. Pizarro and the underlying action remains pending and unresolved.

18. On September 19, 2000, Dr. Pizarro initiated Civil Action No. 00-C-1489(G) in the Circuit Court of Ohio County, West Virginia against Medical Assurance and later Colombo & Stuhr. As to Medical Assurance, Dr. Pizarro has alleged that Medical Assurance's failure to settle the underlying action within policy limits violated a duty to deal in good faith with regard to dealings under the policy and violated provisions of the Unfair Trade Practices Act ["UTPA"]. See Exhibit "D."

19. On or about November 4, 2000, Medical Assurance filed a Motion to Dismiss Dr. Pizarro's Complaint on the basis that the Circuit Court of Ohio County lacked subject matter jurisdiction to entertain Dr. Pizarro's claims because a valid and enforceable arbitration provision exists in the insurance contract under the FAA.

20. On August 17, 2001, Judge Gaughan entered an Order denying Medical Assurance's Motion to Dismiss.[1]

PRAYER FOR RELIEF

WHEREFORE, the Petitioner, Medical Assurance of West Virginia, Inc., prays as follows:

a. That the Petition for Writ of Prohibition be accepted for filing;

b. That this Court issue a rule to show cause against the Respondents directing them to show cause, if any they can, as to why a Writ of Prohibition should not be awarded;

c. That all proceedings in the Circuit Court of Ohio County be stayed until resolution of the issues raised in this Petition;

d. Award a Writ of Prohibition against the Respondents, directing that Civil Action No. 00-C-1489(G) be dismissed from the docket of the Circuit Court of Ohio County due to lack of subject matter jurisdiction; and

e. Such other and further relief as the Court may deem proper.

---

[1] The Circuit Court of Ohio County also entered an Order denying motions to dismiss of Medical Assurance based upon Dr. Pizarro's failure to properly allege that Medical Assurance engaged in a general business practice in violation of the UTPA and that Dr. Pizarro's common law bad faith claim was premature because a final, non-appealable judgment had not been entered in the underlying action.

MEDICAL ASSURANCE OF WEST VIRGINIA, INC.,

By Counsel,

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No. 01-1578

Supreme Court, U.S.
FILED
MAY 21 2002

In The
Supreme Court of the United States

MEDICAL ASSURANCE OF WEST VIRGINIA, INC.,
Petitioner,

v.

EVANGELINE C. PIZARRO, M.D.; COLUMBO AND STUHR, P.L.L.C.,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

BRIEF IN OPPOSITION OF RESPONDENT EVANGELINE C. PIZARRO, M.D.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

I. Factual Backdrop 1

II. Procedural History 4

ARGUMENT 7

I. Dr. Pizarro's Common Law and Statutory Bad Faith Claims Do Not Fall Within The Purview Of The Arbitration Clause 7

II. An Arbitration Clause In An Insurance Policy Cannot Defeat An Action Under The West Virginia Unfair Trade Practices Act 12

III. The Insurance Policy's Arbitration Provision Is Unenforceable Under The Circumstances Of This Case 14

IV. The Federal Arbitration Act Does Not Apply To The Subject Medical Professional Liability Policy 20

A. The Insurance Policy At Issue Does Not Evidence A Transaction Involving Interstate Commerce 20

B. The Federal Arbitration Act Is Reverse Preempted Under The McCarran-Ferguson Act 23

CONCLUSION 27

APPENDIX ..... App.i

TABLE OF AUTHORITIES

Page(s)

I. Table of Cases

American Recovery Corp. v.
Computerized Thermal Imaging, Inc.,
96 F.3d 88, 93 (4th Cir. 1996) 9

Armanda Coal Export, Inc. v. Interbulk Ltd.,
726 F.2d 1556 (11th Cir. 1984) 9

Arnold v. United Companies Lending Corp.,
204 W.Va. 229, 511 S.E.2d 854 (W.Va. 1998) 18

Art's Flower Shop, Inc. v. Chesapeake &
Potomac Telephone Co. of West Virginia, Inc.,
186 W.Va. 613, 413 S.E.2d 670 (1991) 16, 18

Barnhardt Marine Ins., Inc. v.
New England Int'l. Cer. Of Am., Inc.,
961 F.2d 529, 531 (5th Cir. 1992) 23

Board of Educ. of Berkeley Co. v.
W. Harley Miller, Inc.,
160 W.Va. 473, 236 S.E.2d 439 (1977) 16, 17, 18

Century Aluminum of West Virginia, Inc. v.
United Steel Workers of America,
82 F.Supp.2d 580 (S.D. W.Va. 2000) 15

Copley v. NCR Corp.,
394 S.E.2d 751 (W.Va. 1990) 12, 13, 14

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 618 (2000) 15

Dusold v. Porta-John Corp.,
807 P.2d 526 (Ct. App. 1990) 9, 10

Enray Kinoshaita & Co.,
287 F.2d 951 (2nd Cir. 1961) 9

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 15

Fisher v. Bouchelle,
134 W.Va. 333, 61 S.E.2d 305 (1950) 27

Hersman, Inc. v. Fleming Co., Inc.,
19 F.Supp.2d 1282,
1287 (M.D. Ala. 1998), *aff'd.*,
180 F.3d 271 (11th Cir. 1999) 9

International Paper Co. v.Schwabedissen, Maschinen and Anlageng GMBH,
206 F.3d 411 (C.A. 4, W.Va. 2000) 8

Jenkins v. J.C. Penny Casualty Ins. Co.,
167 W.Va. 597, 280 S.E.2d 252 (1981) 13

Kronjaeger v. Buckeye Union Ins. Co.,
200 W.Va. 570, 490 S.E.2d 657 (1997) 11

Marrow Bone Development Co. v. District 17, United Mine Workers of America,
147 F.3d 296(C.A. 4, W.Va. 1998) 8, 15

Mediterranean Enters., Inc. v. Ssangyong Corp.,
708 F.2d 1458, 1464 (9th Cir. 1983) 9

Pulley v. Preferred Risk Mut. Ins. Co.,
897 P.2d 1101 (Nev. 1995) 10

Seaboard Coast Line R.R. v. Trailer Train Co.,
690 F.2d 1343 (11th Cir. 1982) 8

Sec. v. National Sec., Inc.,
393 U.S. 453 (1969) 23

Shamlin v. Nationwide Mut. Ins. Co.,
396 S.E.2d 766 (WV 1990) ..... *passim*

Shearson Hayden Stone, Inc. v. Liang,
493 F.Supp. 104 (N.D. Ill. 1980) 22

Sidney C. Smith Corp. v. Dailey,
136 W.Va. 380, 67 S.E.2d 523 (1950) 27

Smithson v. U. S. Fidelity and Guar. Co.,
186 W.Va. 195, 411 S.E.2d 850 (1991) 17, 18

Snyder v. Smith,
736 F.2d 409 (7th Cir. 1984) 20

State ex rel. v. Blue Cross Blue Shield,
203 W.Va. 690, 510 S.E.2d 764 (1998) 26

State ex rel. Maynard v. Bronson,
167 W.Va. 35, 277 S.E.2d 718 (1981) 27

State ex rel. Ranger Fuel Corp. v. Lilly,
165 W.Va. 98, 267 S.E.2d 435 (1980) 15

Ticknor v. Choice Hotels International, Inc.,
265 F.3d 931 (9th Cir. 2001) 15

Tracer Research Corp. v. National Envtl. Servs. Co.,
42 F.3d 1292 (9th Cir. 1994) 8

Troy Mining Corp. v. Itmann Coal Co.,
176 W.Va. 599, 346 S.E.2d 749 (1986) 16

United States Federal Depot v. Fabe,
508 U.S. 491 (1993) 24

Wilt v. State Auto Mut. Ins. Co.,
203 W.Va. 165, 506 S.E.2d 608(1998) 10-11

Wheeling-Pittsburgh Steel Corp. v. Rowing,
517 S.E.2d 763 (W.Va. 1999) 12

II. Constitutional Provision

U.S. Const. Art. XI Cl. 2 23

III. Statutes and Rules

9 U.S.C. § 2 ..... 14, 20

15 U.S.C. § 167 23

15 U.S.C. § 1011 ..... 13, 23, 25

15 U.S.C. § 1012(b) 23, 25

29 U.S.C. § 1144(a) 24

29 U.S.C. § 1144(b)(2)(A) 24

31 U.S.C. § 3713 26

W.Va.Code 5-11-13(b) 13

W.Va.Code 33-11-1 ..... 5, 13, 25

W.Va.Code 33-11-4(9)(2000) 12

W.Va.Code 33-11-4(9) 13

W.Va.Code 33-24-27 26

W.Va.Code 53-1-1 12

W.V.R .Civ.P Rule 36 19

W.V.R .Civ.P Rule 56 7

*O.R.C.*1343.03(C) 3

IV. Other

Black's Law Dictionary 1236 (6th E.D. 1990) 24

Restatement (2nd) of Contracts 16

STATEMENT OF THE CASE

This brief in opposition to Medical Assurance Inc.'s Petition for a Writ of Certiorari is submitted on behalf of the Respondent, Evangeline C. Pizarro, M.D. The following Factual Backdrop and Procedural History include additional facts or clarifications of the statements contained in the Petition for Writ of Certiorari.

I. Factual Backdrop

The Plaintiff, Evangeline C. Pizarro, M.D., resides in Ohio County, West Virginia. The Defendant, Medical Assurance of West Virginia, Inc. (hereinafter "Medical Assurance") issued a medical professional liability policy to Dr. Pizarro on January 7, 1998 by mailing a copy of such policy to the Doctor at her offices at 2115 Chapline Street, Wheeling, West Virginia.

On July 9, 1998, counsel for Delores and Ralph Young served a notice by certified mail upon Dr. Pizarro at her Wheeling offices and advised the Doctor that the Youngs may bring a medical professional liability action against her relating to medical professional services rendered to Delores Young. Dr. Pizarro immediately forwarded said notice to Medical Assurance.

On December 30, 1998 Delores and Ralph Young filed a medical malpractice action against Dr. Pizarro, and others, in the Court of Common Pleas of Belmont County, Ohio (hereinafter "the underlying action"). The action against Dr. Pizarro was premised upon her alleged failure to diagnose Mrs. Young's rectal cancer which resulted in the development of multiple tumors in her rectum and an eventual surgery for the establishment of a permanent colostomy.

Following the institution of suit, Medical Assurance retained the services of the Morgantown, West Virginia law firm of Colombo and Stuhr, P.L.L.C.; and William A. Davis,

Esq., a member of said firm, was assigned to represent the interests of Dr. Pizarro.

During the course of her deposition in the underlying action, Dr. Pizarro admitted to deviating from appropriate standards of care in a number of respects. Specifically, Dr. Pizarro acknowledged that she deviated from the standard of care in not ordering screening tests for colorectal cancer during the two years before Mrs. Young's initial hemoccult study. She also admitted that she failed to discuss family history with Mrs. Young following the results of the first hemoccult test and that she did not perform a digital rectal examination after obtaining the results of the hemoccult test.

Shortly after giving her deposition in the underlying action, Dr. Pizarro requested Attorney Davis to take steps to resolve the case within policy limits in order to avoid exposure to an excess verdict and the stress associated with having her family's assets jeopardized by a jury trial.

Further, Medical Assurance was advised by Dr. Pizarro's defense counsel that, based on their evaluation, the case would be difficult to defend; and it was the recommendation of both defense counsel and the local claims department that Medical Assurance grant settlement authority.

During an August 11, 2000 settlement conference, the Young's counsel proposed settlement at the $875,000 level. At this time a co-defendant, Dr. Lavapies, settled out of the case for $250,000. Medical Assurance's offer of $10,000 on behalf of Dr. Pizarro was, not surprisingly, rejected. Later, defense counsel reiterated the recommendation that the action be settled within policy limits, however, despite its awareness that the case presented a high risk defense and that the case could be settled for $300,000, Medical Assurance pressed the case to trial.

Because Dr. Pizarro did not want to be the only defendant left in the case at trial, she again requested

defense counsel to take such steps as may be necessary to have her insurer resolve the underlying action within policy limits. The request, however, was to no avail as the action against Dr. Pizarro proceeded to trial; and on August 25, 2000, following four days of trial by jury, a verdict for compensatory damages totaling $7,500,000 was entered against Dr. Pizarro and her co-defendant (the clinic where she provided medical services). The trial court gave the defendants credit for the $250,000 settlement made with Dr. Lavapies and entered a Judgment on Verdict in favor of Delores Young and against Dr. Pizarro and the clinic in the amount of $4,833,333.33 together with post-judgment interests at the rate of 10% per annum from August 25, 2000 until paid and granted judgment on the loss of consortium claim in favor of the Plaintiff, Ralph Young, against Dr. Pizarro and her co-defendant in the amount of $2,416,666.67 along with post-judgment interest upon the same terms.

Following the verdict, the trial court denied Dr. Pizarro's motion for a new trial and all of the other substantive post-verdict motions filed on her behalf. The trial court also granted the defendant clinic's motion for a directed verdict on its cross claim for indemnification against Dr. Pizarro, thereby leaving Dr. Pizarro responsible for the entire judgment.

Further, after determining that Dr. Pizarro's representatives failed to make a good faith effort to settle the case, the trial court granted the Young's motion for pre-judgment interest as provided for at *Ohio Revised Code* 1343.03(C). The pre-judgment interest resulting from Medical Assurance's failure to make a good faith effort to settle the claim on behalf of Dr. Pizarro added another $818,420 to the $7,250,000 judgment. Post-judgment interest has also been running since the date of judgment at the rate of 10% per annum. Hence, Medical Assurance's insistence to try the underlying case resulted in Dr. Pizarro being found liable for damages to the Youngs in an amount in

excess of $8,000,000; and such damages are continuing to accumulate at a rate in excess of $67,000 per month.

Following the entry of this staggering verdict, Dr. Pizarro retained separate counsel to represent her personal interests. Despite said counsels' request for Medical Assurance to acknowledge its responsibility to indemnify Dr. Pizarro for the excess judgment arising out of its failure to reasonably resolve the underlying action within policy limits, Medical Assurance refused to indemnify Dr. Pizarro for any sum in excess of the $1,000,000 of coverage afforded under her policy.

Although Medical Assurance prosecuted an appeal in the underlying action, (and such appeal remains pending) the verdict which was returned against Dr. Pizarro had a devastating effect upon the doctor and her family. Indeed, subsequent to the entry of the excess verdict, Dr. Pizarro retired from the practice of medicine.

II. Procedural History

Following Medical Assurance's refusal to indemnify its insured from the excess judgment which was entered against her, Dr. Pizarro instituted proceedings against Medical Assurance and the attorneys which it retained on her behalf in the Circuit Court of Ohio County, West Virginia. (Civil Action No. 00-C-1489(G)). The action against Medical Assurance is premised upon principles of common law and statutory insurance bad faith. In *Shamlin v. Nationwide Mut. Ins. Co.*, 396 S.E.2d 766 (WV 1990) the West Virginia Supreme Court of Appeals held that an insurer may be liable to an insured for an excess judgment entered against the insured in an underlying personal injury suit where the insurer, in bad faith, fails to settle a claim within policy limits. Under *Shamlin*, "whenever there is a failure on the part of the insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured

from all personal liability," there exists a *prima facie* case of bad faith. Id. at 776. Upon the establishment of a *prima facie* case, the burden shifts to the insurer to prove by clear and convincing evidence: (1) that it attempted in good faith to negotiate a settlement, (2) that the failure to enter into a settlement where the opportunity to do so existed was based on reasonable and substantial grounds, and (3) that it accorded the interests and rights of the insured at least as great a respect as its own. Id. at 776.

Because Medical Assurance failed to settle the underlying action within policy limits when there existed an opportunity to so settle and such settlement would have released Dr. Pizarro from any and all personal liability, Dr. Pizarro's *prima facie* case of bad faith under *Shamlin* is apparent.

In addition to her *Shamlin* claim, Dr. Pizarro has also alleged that Medical Assurance's failure to settle the underlying action under the circumstances described above was violative of the West Virginia Unfair Trade Practices Act as provided for at *W.Va.Code* 33-11-1 et.seq.

The amended complaint also sets forth a claim for attorney malpractice against the attorneys retained by Medical Assurance on behalf of Dr. Pizarro. Here, Dr. Pizarro contends that in a case where an insured requests settlement and expresses concern about the exposure of personal assets to an excess verdict, her counsel has a duty to take appropriate steps to protect the client's personal assets from being jeopardized by an insurer bent on placing its own financial interests above those of its insured.

Following the institution of proceedings in circuit court, Medical Assurance filed a motion to dismiss whereby it asserted, *inter alia*, that the trial court lacked subject matter jurisdiction over Dr. Pizarro's action against it by virtue of an arbitration provision in Dr. Pizarro's medical professional liability policy.

After permitting the parties to conduct discovery regarding the arbitration question and considering the

memoranda of law submitted by the parties, oral argument upon the motion and other pertinent legal authorities, the trial court denied Medical Assurance's motion to dismiss for lack of subject matter jurisdiction by order entered on August 16, 2001 (see: Petition for Writ of Certiorari at App. 3).

Thereafter, Medical Assurance brought an original proceeding seeking a writ of prohibition before the Supreme Court of Appeals of West Virginia based on its assertion that the circuit court abused its power and exceeded its authority by denying its motion to dismiss.

Upon receipt of Medical Assurance's petition, the West Virginia Supreme Court of Appeals requested a response to the petition from Dr. Pizarro and following consideration of the petition and Dr. Pizarro's response, the West Virginia high court refused the petition by order under date of January 23, 2002.

In a surprising turn of events, by correspondence under date of March 12, 2002, counsel for Medical Assurance advised counsel for Dr. Pizarro that Medical Assurance was willing to indemnify Dr. Pizarro for any and all damages or other relief awarded against her with respect to the August 25, 2000 jury verdict entered in the underlying action. Thereafter, Dr. Pizarro filed a motion for partial summary judgment.

Based upon Medical Assurance's agreement to indemnify Dr. Pizarro, the circuit court found that Dr. Pizarro had accomplished the primary objective of her *Shamlin* action and entered an order adjudging that Dr. Pizarro had prevailed with regard to her action for bad faith against Medical Assurance designed to relieve her of any personal liability for any judgment ultimately rendered against her in the underlying action irrespective of the liability limitation contained in the subject medical professional liability policy. See: Order, Appendix 1.

Because Medical Assurance's agreement to indemnify Dr. Pizarro did not permit the circuit court to

fully adjudicate the action under Rule 56 of the West Virginia Rules of Civil Procedure, the circuit court has retained jurisdiction to consider issues arising under Dr. Pizarro's claim under West Virginia's Unfair Trade Practices Act, the amount of reasonable attorney's fees to which Dr. Pizarro is entitled for vindicating her *Shamlin* claim, and other questions relating to the extent and nature of the damages to which Dr. Pizarro may be entitled for the claims made against Medical Assurance. See: Order, Appendix 1. Hence, these limited issues involving Medical Assurance remain pending in the West Virginia circuit court.

Medical Assurance contends that the issue before this Court is whether the West Virginia court may, on public policy grounds, refuse to enforce an arbitration clause that is otherwise enforceable under the FAA. Because, however, the circuit court's decision in this matter was not premised solely upon principles of public policy and because the Supreme Court of Appeals of West Virginia considered several legal arguments challenging the enforceability of the subject arbitration clause in addition to the public policy issue, the "question presented" by Medical Assurance incompletely and inaccurately characterizes the scope of the issues presented to and considered by the West Virginia courts.

ARGUMENT

I. Dr. Pizarro's Common Law and Statutory Bad Faith Claims Do Not Fall Within The Purview Of The Arbitration Clause.

In denying Medical Assurance's motion to dismiss based on lack of subject matter jurisdiction, the circuit court found that Dr. Pizarro's common law and statutory bad faith claims were not barred by the insurance policy's arbitration provision.

As discussed above, the amended complaint set forth a first party *Shamlin* action and a statutory bad faith claim against Medical Assurance. Importantly, the amended

complaint neither states a claim for breach of contract nor alleges that Medical Assurance breached any provision of the subject insurance policy issued to Dr. Pizarro.

Because arbitration provisions are contractual in nature, construction of such provisions and the contracts in which they appear is a matter of contract interpretation. See: *Seaboard Coast Line R.R. v. Trailer Train Co.*, 690 F.2d 1343, 1352 (11th Cir. 1982). The question of whether an arbitration clause requires arbitration of a particular dispute therefore "rests on the intent of the parties." *Seaboard*, 690 F.2d at 1348. A corollary of this rule is that no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate. *Seaboard*, 690 F.2d at 1352 (holding that the federal policy favoring arbitration "cannot serve to stretch a contract beyond the scope originally intended by the parties"). See also: *Tracer Research Corp. v. National Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994). The principle that a party cannot be required to submit to arbitration any dispute which he has not contractually agreed to submit is also well accepted in West Virginia. *International Paper Co. v. Schwabedissen, Maschinen and Anlageng GMBH*, 206 F.3d 411 (C.A. 4, W.Va. 2000), *Marrow Bone Development Co. v. District 17, United Mine Workers of America*, 147 F.3d 296 (C.A. 4, W.Va. 1998).

While Dr. Pizarro does not dispute that parties to an agreement may waive adjudication in favor of arbitration, a party may be compelled to arbitrate only those issues to which the parties have agreed. Because the arbitration clause at issue in this case does not demonstrate Dr. Pizarro's waiver of her right to adjudicate the common law and statutory remedies available to her in West Virginia, the clause is inadequate to compel the arbitration of her action for bad faith.

In interpreting arbitration clauses which include claims or controversies "arising out of" a particular contract, courts have found such clauses to be narrow in scope; i.e., the scope of the arbitration clause is limited to those claims

having some direct relation to the terms and provisions of the contract. See: *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983); *Enray Kinoshaita & Co.*, 287 F.2d 951, 953 (2nd Cir. 1961). Both the *Mediterranean* and *Kinoshaita* courts found that claims which did not rely on the interpretation or performance of the contract containing the arbitration clause are not subject to arbitration as disputes "arising out of" the contract.

While adding the phrase "relating to" the phrase "arising out of" has been construed as broadening the scope of the arbitration provision see: *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996), even in contracts containing broad arbitration provisions, the determination of whether a specific dispute is required to be submitted to arbitration necessarily depends on the existence of some nexus between the dispute and the contract containing the arbitration clause.

The mere fact that a tort action would not have arisen "but for" the existence of the contract and consequent relationship between the parties has been found to be insufficient to transform such action into a dispute "arising out of or relating to" the contract. See: *Armanda Coal Export, Inc. v. Interbulk, Ltd.*, 726 F.2d 1566, 1568 (11th Cir. 1984); *Hersman, Inc. v. Fleming Co., Inc.*, 19 F.Supp.2d 1282, 1287 (M.D. Ala. 1998), *aff'd.* 180 F.3d 271 (11th Cir. 1999). Hence, in order for an action in tort to be considered "arising out of or relating to" an agreement, such action should, at a minimum, raise some issue which requires reference to or construction of some portion of the contract to resolve. See: *Hersman*, 19 F.Supp. 2d at 1286-87. In *Dusold v. Porta-John Corp.*, 807 P.2d 526, 530 (Ct. App. 1990) the court ruled that:

> "in order for the dispute to be characterized as arising out of or related to the subject matter of the contract, and thus subject to arbitration, it must, at the very least, raise some issue the resolution of which requires

> reference to or construction of the contract itself. Further, the relationship between the dispute and the contract is not satisfied simply because the dispute would not have arisen absent the existence of the contract between the parties." Id. at 529.

Under the analytical framework established in *Dusold*, in cases where:

> "the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties, then a dispute regarding such a breach is not one arising from the contact, but sounds in tort. Therefore, a contractually-imposed arbitration requirement...would not apply to such a claim." *Dusold* at 529.

In applying these principles to the action *sub judice*, the West Virginia circuit court noted that Dr. Pizarro's action against Medical Assurance is predicated upon theories of common law and statutory insurance bad faith (see: Petition for Writ of Certiorari at App. 4). Indeed, the action is wholly unrelated to any rights, obligations, or duties arising under any specific policy of insurance; and instead, arises out of and relates to general duties owed by insurers to their insureds under law in West Virginia.

In finding that a bad faith action was not barred by an insurance policy's arbitration provision, the Supreme Court of Nevada in *Pulley v. Preferred Risk Mut. Ins. Co.*, 897 P.2d 1101 (Nev. 1995) held that "the duty to act in good faith does not arise from the terms of an insurance contract, but rather, the duty of good faith and fair dealing is imposed by law, and the violation of this duty is a tort. Id. at Syl. Pt. 5. *Pulley* is consistent with the holding *Wilt v. State Auto Mut.*

Ins. Co., 203 W.Va. 165, 506 S.E.2d 608 (1998) where the West Virginia Supreme Court of Appeals made it clear that an action against an insurer for unfair claim settlement practices sounds in tort, not in contract. Id. at Syl. Pt. 2.

In West Virginia it has also been recognized that an insurer has an "overarching duty" to deal with its insured fairly and in good faith. *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W.Va. 570, 490 S.E.2d 657 (1997) at Syl. Pt. 13. Such "overarching duty" does not arise out of and relate to any specific policy of insurance, but rather relates to common law and statutory duties which transcend contractural obligations.

Dr. Pizarro's bad faith claim against Medical Assurance is based upon her contention that Medical Assurance failed to settle the underlying action when there existed an opportunity to settle and when such settlement would have released its insured from any and all personal liability. Dr. Pizarro further contends that Medical Assurance's failure to enter into such settlement where the opportunity to do so existed was not based upon reasonable and substantial grounds, and that Medical Assurance failed to accord the interests and rights of Dr. Pizarro at least as great a respect as its own. This action arises out of Medical Assurance's breach of its duty to deal fairly and in good faith with its insured by reasonably resolving the underlying action when the opportunity to do so existed and its decision to place its own financial interests above those of its insured. It is the alleged breach of common law and statutory duties imposed upon Medical Assurance under law in West Virginia that form the basis of Dr. Pizarro's action, not its breach of any duty or obligation arising under the subject insurance policy. The action against Medical Assurance raises no issue which requires reference to or construction of the policy to resolve. Therefore, the action cannot fairly be said to arise out of or relate to the policy for purposes of enforcing the arbitration clause.

Hence, the West Virginia circuit court's finding that Dr. Pizarro's common law and statutory bad faith claims did not fall within the purview of the subject arbitration clause was neither an abuse of its power nor an act in excess of its authority; and the West Virginia high court correctly found that prohibition did not lie under *W.Va. Code*, 53-1-1.

II. An Arbitration Clause In An Insurance Policy Does Not Bar Dr. Pizarro's Action Under The West Virginia Unfair Trade Practices Act.

In addition to finding that Dr. Pizarro's common law and statutory bad faith claims are not within reach of the subject arbitration provision, the West Virginia circuit court also denied Medical Assurance's motion to dismiss for lack of subject matter jurisdiction on the basis that it is against public policy for an insurance company to insert an arbitration provision into an insurance policy which eviscerates a policyholder's statutorily created rights. Here, the West Virginia circuit court noted that:

> "In West Virginia, an insured has a private cause of action against her insurer for breach of its general legal duty to deal fairly and in good faith in settling claims against her. See: *W.Va.Code* 33-11-4(9)(2000). This Court believes that Dr. Pizarro's statutory right to sue Medical Assurance for breach of its legal duty would effectively be defeated if the arbitration provision controlled this dispute." *Cf. Wheeling-Pittsburgh Steel Corp. v. Rowing*, 517 S.E.2d 763 (W.Va. 1999); *Copley v. NCR Corp.*, 394 S.E.2d 751 (W.Va. 1990). (see: Petition for Writ of Certiorari at App. 5).

In *Copley v. NCR Corp.*, 183 W.Va. 152, 394 S.E.2d 751 (1990) the West Virginia Supreme Court of Appeals considered the enforceability of an arbitration provision

which would have extinguished an employees right to bring an action for a human rights violation under *W.Va.Code*, 5-11-13(b). The question in *Copley* was whether the right to bring a statutory civil action for a human rights violation could be extinguished by an arbitration clause in an employment contract. After noting that a majority of the federal courts of appeals have concluded that even where an employee is subject to the Federal Arbitration Act, the contractual obligation to submit to arbitration cannot override or defeat a civil rights claim, the *Copley* court concluded that "under West Virginia law, an arbitration clause in an employment contract cannot defeat a human rights action filed by the claimant pursuant to *W.Va.Code*, 5-11-13(b)." *Copley* at Syl. Pt. 2.

Dr. Pizarro's action is premised, in part, upon her allegation that Medical Assurance's conduct was violative of West Virginia's Unfair Trade Practices Act. In *Jenkins v. J.C. Penny Casualty Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981) the West Virginia Supreme Court of Appeals determined that an implied private cause of action exists for an insurance company's violation of the unfair settlement practice provisions of *W.Va.Code*, 33-11-4(9). In so ruling, this court observed that *W.Va.Code*, 33-11-1 declares the general purpose of the act is to define and prohibit unfair insurance trade practices. In *Jenkins* the West Virginia Supreme Court of Appeals also found that the McCarran-Ferguson Act referenced in the West Virginia statute contains a general declaration that the regulation of insurance is a matter left to "the several states." *Jenkins* at 605 citing 15 U.S.C.A. § 1011 *et. seq.* In *Jenkins* the West Virginia Supreme Court of Appeals also expressly recognized the existence of a "strong policy declaration in our statute against unfair insurance practices;" and found that such policy supported a private cause of action for violation of the statute's unfair settlement practices provision.

Dr. Pizarro submits that the arbitration clause at issue in this case does not supersede or constitute a waiver and her right to bring judicial proceedings against an insurer alleged to have acted in contravention of West Virginia's Unfair Trade Practices Act. This is particularly true in a case where Medical Assurance has made no showing that Dr. Pizarro ever made a knowing and intelligent waiver of her constitutionally guaranteed access to the courts at the time the subject policy was issued.

Just as the arbitration clause in the employment contract in *Copley* was held not to defeat a human rights action filed by the claimant therein, the West Virginia circuit court correctly found that the arbitration clause contained in the instant insurance contract should not be permitted to defeat an insured's right to adjudicate a private cause of action for violation of the West Virginia Unfair Trade Practices Act.

While the West Virginia circuit court limited the terms of its order denying Medical Assurance's Motion to Dismiss to the question of whether Dr. Pizarro's claims fell within the purview of the arbitration clause and the question of whether the arbitration clause barred Dr. Pizarro's action under the West Virginia Unfair Practices Act, in determining the propriety of the circuit court's ruling, briefs before the West Virginia Supreme Court of Appeals included a discussion of other reasons providing an ample basis for the circuit court's jurisdiction over this action.

III. The Insurance Policy's Arbitration Provision May Not Be Enforced Under The Specific Circumstances Of This Case.

The Federal Arbitration Act ("FAA") provides that an arbitration provision is enforceable except "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In determining whether a valid arbitration agreement arose between the parties to a contract

courts must look to state law governing the formation of contracts. See: *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

It is clear that generally applicable contract defenses, such as unconscionability, may be applied to arbitration agreements without contravening the FAA. See: *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 618, 686 (2000). Under this rule, as long as state law defenses concerning the validity, revocability, and enforceability of contracts are generally applicable to all contracts, and not limited to arbitration clauses, such defenses may be applied to invalidate arbitration agreements without offending the FAA. Therefore, it was Dr. Pizarro's contention before the West Virginia high court that her defense of unenforceable may properly be decided under state law.

This principle was recently upheld in *Ticknor v. Choice Hotels International, Inc.*, 265 F.3d 931 (9th Cir. 2001) where the court found that the FAA did not prevent an arbitration provision in a franchise agreement from being deemed to be unenforceable as unconscionable under Montana law. In a similar fashion, West Virginia defenses concerning the enforceability of the subject arbitration provision may be applied in this case.

In West Virginia the threshold question of arbitrability has been held to be a matter of contract to be determined by the court. *Century Aluminum of West Virginia, Inc. v. United Steel Workers of America*, 82 F.Supp.2d 580 (S.D. W.Va. 2000). In the same vein, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine. *State ex rel. Ranger Fuel Corp. v. Lilly*, 165 W.Va. 98, 267 S.E.2d 435 (1980). Courts must also decide issues pertaining to the legality of the underlying contract because such questions go to the very basis of an arbitrator's power. *Marrow Bone Development Co. v. District 17 United Mine Workers of America*, 147 F.3d 296 (C.A. 4, W.Va. 1998).

Therefore, in cases where a party alleges that an arbitration provision is unconscionable or that the contract was one of adhesion, the question of whether the arbitration provision was bargained for and valid is a question for the court to decide. In undertaking such determination court's in West Virginia must make reference to the entire contract, the nature of contracting parties, and the nature of the contract. *Art's Flower Shop, Inc. v. Chesapeake & Potomac Telephone Co. of West Virginia, Inc.*, 186 W.Va. 613, 413 S.E.2d 670 (1991).

"Unconscionability" is a principle of general contract law which is based in equity and deeply ingrained in West Virginia jurisprudence. In *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986) this Court was guided by the Restatement (2nd) of Contracts in defining the parameters of the defense of unconscionability:

> "a bargain is not unconscionable merely because the parties to it are unequal in bargaining position, or even because the inequality results in allocation of risks to the weaker party. But gross inadequatecy of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion or may show that the weaker party had no meaningful, or real alternative, or did not in fact assent or appear to assent to the unfair terms." *Troy* 176 W.Va. at 604, 346 S.E.2d at 753.

In *Board of Educ. of Berkeley Co. v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439 (1977) the West Virginia Supreme Court of Appeals discussed the defense of "unconscionability" in the context of an arbitration provision and held that:

> "...[W]here a party alleges that the arbitration provision was unconscionable, or was thrust upon him because he was unwaring and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract." Id. at Syl. Pt. 3.

Hence a key issue on the question of whether an arbitration provision is unconscionable is whether it was "bargained for;" and the question of whether the provision was "bargained for" is a matter of law. *Miller* at 486-87.

In *Smithson v. U.S. Fidelity and Guar. Co.*, 186 W.Va. 195, 411 S.E.2d 850 (1991) an insurer asserted that an insured's bad faith action was barred because an underlying fire loss case was settled through arbitration. The insurer in *Smithson* argued that where a contract provides for mandatory arbitration, it precludes the parties from litigating the controversy in the courts. Medical Assurance advances the same argument here. While noting that the general rule regarding the enforcement of arbitration provisions in West Virginia is set forth in *Miller, supra,* the *Smithson* court was careful to highlight *Miller's* acknowledgment "that a contractual requirement of arbitration is not absolute and will not be enforced if there was disparate bargaining power, if there was an adhesion contract, or if the provision was unconscionable." *Smithson* at 201-02.

The *Smithson* court ultimately determined that the policy at issue did not provide for arbitration, but rather provided for an appraisal process. However, the decision has a bearing on the action *sub judice* to the extent that it

instructs that in determining the validity of an arbitration clause in an insurance contract, courts in West Virginia may consider the disparate bargaining power of the parties, the question of whether there was an adhesion contract and the issue of unconscionability.

In *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998) the West Virginia Supreme Court of Appeals considered the question of whether an arbitration agreement entered into as part of a consumer loan transaction was unenforceable on the grounds that it was unconscionable, a contract of adhesion or in contravention of public policy. After applying the rule announced in *Art's Flower Shop, supra,* the *Arnold* court found that the arbitration agreement was "void for unconscionability" due, in part, to the "grossly unequal" position of the parties. *Arnold* at 861.

In applying the precepts of *Miller, Smithson* and *Arnold,* it is clear that under general principles of contract law in West Virginia, a court may find the arbitration provision at issue to be unenforceable. The question of disparate bargaining power cannot be debated. Dr. Pizarro was confronted by an insurer holding an oligopolistic position as one of but a few insurer's offering medical professional liability insurance in West Virginia. The bargaining positions of Dr. Pizarro and Medical Assurance were grossly unequal and the arbitration provision at issue was clearly not bargained for.

It is also clear that this case involves an adhesion contract. Indeed, the subject arbitration clause is contained within the quintessential contract of adhesion: an insurance policy. Thus, there was an ample basis for the court in West Virginia to conclude that the arbitration provision in this case was certainly not bargained for.

During the course of discovery in this action Dr. Pizarro requested Medical Assurance to produce all documents purporting to demonstrate any agreement by Evangeline C. Pizarro to waive her right to seek redress

against Medical Assurance in a West Virginia court of law for common law and statutory torts committed against her. In response, Medical Assurance produced a copy of the subject insurance policy along with policy applications and renewal questionnaires submitted by Dr. Pizarro. The Rule 36 admissions which followed the receipt of such discovery, however, demonstrated that none of the policy applications or renewal questionnaires contained any disclosure indicating that the professional liability policy to be issued as a result of such applications or questionnaires would contain a mandatory arbitration clause. Further, Medical Assurance has also admitted that the specific application submitted in connection with the policy at issue in this case did not contain any disclosure indicating that the insurance policy issued to Dr. Pizarro would contain a mandatory arbitration provision. Medical Assurance further admits that no letters, memoranda or other documents which were distributed to medical practitioners in West Virginia as explanatory or advertising material for medical professional liability policies disclosed that the insurance policies issued by Medical Assurance contained a provision requiring mandatory arbitration.

Evidence considered by the circuit court showed that the arbitration clause which Medical Assurance contends prevents the adjudication of this action was never even discussed with Dr. Pizarro prior to the issuance of the subject policy and was certainly not "bargained for" in any meaningful fashion. Indeed, evidence adduced in this matter made it clear that Dr. Pizarro was not even aware that her policy contained an arbitration clause until Medical Assurance raised the same as a bar to the instant action.

Despite Medical Assurance's refusal to admit that the subject insurance policy constitutes a contract of adhesion, it is clear that the policy is a "form contract" which bears all of the traditional earmarks of an adhesion contract. It is also clear that the parties' respective bargaining positions were grossly unequal and that the

arbitration provision in the subject insurance policy was never even disclosed to the insured, let alone bargained for.

Accordingly, in addition to the reasons discussed in the circuit court's decision denying Medical Assurance's Motion to Dismiss, the West Virginia Supreme Court of Appeals had an ample basis to deny Medical Assurance's Petition for a Writ of Prohibition based upon the conclusion that the arbitration provision contained in the subject insurance contract was unenforceable under general principles of contract law in West Virginia when applied to the specific circumstances of this case.

IV. The Federal Arbitration Act Does Not Apply To The Subject Medical Professional Liability Policy.

A. The Insurance Policy At Issue Does Not Evidence A Transaction Involving Interstate Commerce.

The Federal Arbitration Act applies only to maritime transactions or "a contract evidencing a transaction involving commerce." *Snyder v. Smith*, 736 F.2d 409, 417 (7th Cir. 1984); 9 U.S.C. § 2. Under the Act, "commerce" means "interstate commerce." Because there is no maritime transaction here, the application of the FAA requires an initial determination as to whether the insurance policy at issue evidences a transaction involving interstate commerce.

Although the requirement that an arbitration agreement evidence a transaction involving interstate commerce is to be construed broadly, it is clear that the rule of broad construction need not result in a finding that every agreement evidences a transaction involving interstate commerce. In determining whether a contract containing an arbitration provision evidences a transaction involving interstate commerce, courts are instructed look to the entire contract. Based on the discovery conducted below the following key facts are undisputed:

i) Medical Assurance of West Virginia, Inc. is a West Virginia corporation with its principal place of business located at 107 Capitol Street, Suite 200, Charleston, West Virginia.

ii) The designated policyholder of the subject policy is "Pizarro and Pizarro M.D.s" and that said policyholder's address is listed as 2115 Chapline Street, Suite 201, Wheeling, West Virginia.

iii) The agent which sold the subject policy was Berry, Bippus, Chison & Foose, with offices at 1117 Chapline Street, Wheeling, West Virginia.

iv) Medical Assurance of West Virginia, Inc. issued the subject policy to "Pizarro and Pizarro, M.D.s" by mailing a true copy thereof to 1115 Chapline Street, Suite 201, Wheeling, West Virginia.

v) The subject policy contains a West Virginia state law endorsement.

Based on these facts, it is apparent that the insurance policy at issue in this case does not evidence a transaction involving interstate commerce. Indeed, the only part of the policy which even mentions interstate commerce is the self-serving statement in the arbitration clause providing that the parties "acknowledge that this agreement evidences a transaction involving interstate commerce."

Despite the gratuitous language to the contrary, the fact remains that the insurance policy in this case was issued

by a West Virginia domestic insurance company to a West Virginia domestic business enterprise, was sold by a West Virginia sales agent, and covered physicians who reside in West Virginia. There is virtually no aspect of the subject medical professional liability policy which evidences that such policy involves interstate commerce.

Indeed, Medical Assurance has admitted that all policies of insurance issued to physicians in West Virginia in 1998 contained a mandatory arbitration provision, irrespective of the policyholder's proximity to the state border. Therefore, the same "acknowledgment" that the policy involves interstate commerce was inserted into policies issued to doctors with practices in the deep interior portions of this state where there would be not even an arguable involvement of interstate commerce. Medical Assurance's admission in this regard could not more clearly reveal that the purported "acknowledgment" which prefaces the arbitration provision in the subject insurance policy is little more than a subterfuge.

While Dr. Pizarro certainly acknowledges that her action against Medical Assurance involves a judgment entered against her in Ohio, the threshold question triggering the applicability of the FAA does not inquire into the basis of the parties' dispute. Instead, the inquiry is limited to whether "the contract" evidences a transaction involving interstate commerce. Because interstate commerce is a necessary basis for application of the FAA, and contacts or agreements not so predicated are to be governed by state law see: *Shearson Hayden Stone, Inc. v. Liang*, 493 F.Supp. 104 (N.D. Ill. 1980), the West Virginia court my properly find that the FAA is not applicable and that the arbitration provision is unenforceable under principles of state law.

Hence, in addition to the reasons set forth in the circuit court's opinion denying Medical Assurance's Motion to Dismiss, the high court in West Virginia had a sufficient factual record to determine that because the medical professional liability policy at issue in this case did not

evidence a transaction involving interstate commerce, the FAA did not control the subject arbitration provision.

B. The Federal Arbitration Act Is Reverse Preempted Under The McCarran-Ferguson Act.

In ruling upon Medical Assurance's Petition for Writ of Prohibition, the West Virginia Supreme Court of Appeals was also briefed by both sides on the issue of whether the application of the FAA in this matter was reversed pre-empted by the McCarran-Ferguson Act.

Congress enacted the McCarran-Ferguson Act, 15 U.S.C. 167; 1011, *et seq.*, for the specific purpose of consigning to the state broad and primary responsibility for regulating the insurance industry. See: *Sec. v. National Sec., Inc.*, 393 U.S. 453, 458 (1969); *Barnhardt Marine Ins., Inc. v. New England Int'l. Cer. Of Am., Inc.*, 961 F.2d 529, 531 (5th Cir. 1992). The McCarran-Ferguson Act, provides in pertinent part that:

> "...no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance...unless such Act specifically relates to the business of insurance...." 15 U.S.C. 167; 1012(b).

Ordinarily, federal law pre-empts conflicting state law by virtue of the supremacy clause. See: *U.S. Const. Art. XI Cl. 2.* The McCarran-Ferguson Act, however, reverses the effect of the supremacy clause in a narrow range of cases involving state regulation of the insurance industry. By its terms, the McCarran-Ferguson Act permits a state law to reverse pre-empt a federal statute if (1) the federal statute does not specifically relate to the "business of insurance," (2) the state law was enacted for the "purpose of regulating the

business of insurance," and (3) the federal statute operates to "invalidate, impair, or supersede" the state law.

It is clear that the FAA does not relate specifically to the business of insurance. Hence, the first prong of reverse preemption is easily satisfied.

The category of laws enacted "for the purpose of regulating the business of insurance" is broad and consists of those laws "that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *United States Federal Depot v. Fabe*, 508 U.S. 491, 505 (1993) (quoting Black's Law Dictionary 1236, 1286 (6th E.D. 1990)). Further, statutes which focus upon protecting the relationship between the insurer and insured are deemed to be laws regulating the business of insurance. Id. at 501.

Under the McCarran-Ferguson Act, the West Virginia Unfair Trade Practices Act will reverse preempt the FAA if the West Virginia law is deemed to have been enacted "for the purpose of regulating the business of insurance." Hence, to support its position in this case, Medical Assurance argued that the West Virginia Unfair Trade Practices Act was not enacted for the purpose of regulating the business of insurance. In fashioning its argument on this point before the West Virginia Supreme Court of Appeals, Medical Assurance turned a blind eye to the language of the West Virginia statute and, instead, relied upon federal case law dealing with the interplay between ERISA's "preemption clause" (29 U.S.C. § 1144(a)) and ERISA's "savings clause" (29 U.S.C. § 1144(b)(2)(A)). Because, however, this action has nothing to do with an employee welfare benefit plan, Medical Assurance's evocation of ERISA in support of its preemption argument was woefully misplaced in its petition to the West Virginia high court.

Dr. Pizarro respectfully submits that rather than exploring the contours of the law of ERISA preemption, the West Virginia Supreme Court of Appeals needed only to

apply the clear language of the McCarran-Ferguson Act to the West Virginia Unfair Trade Practices Act to determine whether the latter reverse preempts the FAA in this case. Under the McCarran-Ferguson Act, the FAA "shall not be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance...." 15 U.S.C. § 1012(b). Hence, the West Virginia Supreme Court of Appeals could well have boiled the reverse preemption issue down to the question of whether the West Virginia Unfair Trade Practices Act constitutes a law which was enacted by the West Virginia legislature "for the purpose of regulating the business of insurance."

The purpose of the West Virginia Unfair Trade Practices Act is not difficult to decipher as it is expressly stated at *W. Va. Code*, 33-11-1, entitled Declaration of Purpose:

> "...**the purpose of this article is to regulate trade practices in the business of insurance** in accordance with the intent of Congress as expressed in the act of Congress of March 9, 1945 (Public Law fifteen, seventy-ninth Congress), by defining or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." Id. (emphasis added)

Public Law 15, 79th Congress is codified at 15 U.S.C. §§ 1011 *et seq.* and is popularly known as the McCarran-Ferguson Act. Hence, the West Virginia Supreme Court of Appeals was certainly in a position to apply the clear and unambiguous language of the Unfair Trade Practices Act, and find that under its express terms it does indeed constitute a law enacted by a state for the purpose of

regulating the business of insurance such as to reverse preempt the FAA under the McCarran-Ferguson Act.

The doctrine of reverse preemption under the McCarran-Ferguson Act was recognized by the West Virginia Supreme Court of Appeals in *State ex rel. v. Blue Cross Blue Shield*, 203 W.Va. 690, 510 S.E.2d 764 (1998) where the provisions of *W.Va.Code*, 33-24-27 relating to an insurer's liquidation proceedings were found to be sufficiently geared to protect policyholders so that, under the McCarran-Ferguson Act, a state statute governing claim priority reverse pre-empted the federal priority statute found at 31 U.S.C. § 3713. See: *Blue Cross Blue Shield* at 712. Likewise, the Unfair Trade Practices Act is quite clearly intended to protect policyholders from the very type of unfair trade practice which is alleged in the amended complaint filed by Dr. Pizarro against Medical Assurance. Accordingly, the West Virginia Supreme Court of Appeals may have properly found that because the Unfair Trade Practices Act was enacted for the purpose of regulating the business of insurance that the second prong of the test for reverse preemption under McCarran-Ferguson Act is met in this case.

Finally, it is clear that the effect of applying the FAA to the insurance policy at issue would be to "invalidate, impair or supersede" the action which Dr. Pizarro has brought under the Unfair Trade Practices Act. Thus, the West Virginia Supreme Court of Appeals had a sound basis to find that the third prong of the test for reverse preemption under McCarran-Ferguson Act was certainly satisfied in this case.

Because (1) the FAA does not specifically relate to the "business of insurance," (2) the Unfair Trade Practices Act was enacted for the "purpose of regulating the business of insurance," and (3) the application of the FAA to the subject insurance policy would operate to "invalidate, impair or supersede" Dr. Pizarro's state law action, the West Virginia Supreme Court of Appeals had a sufficient basis to

conclude that the West Virginia Unfair Trade Practices Act, reverse preempts the FAA's application to the subject insurance policy under the McCarran-Ferguson Act.

CONCLUSION

Based on the foregoing, it is clear that the courts in West Virginia have not improperly refused to enforce a valid arbitration clause in this case. Indeed, the decision of the circuit court to allow Dr. Pizarro to go forward with her claims against Medical Assurance under law in West Virginia was in all ways proper and consistent with controlling federal and state law.

Further, the West Virginia Supreme Court of Appeals' refusal of Medical Assurance's Petition for a Writ of Prohibition does not demonstrate that the West Virginia court has decided any federal question in a manner that conflicts with federal law or the decisions of this Court. Instead, the West Virginia high court's refusal of Medical Assurance's petition only shows that Medical Assurance failed to establish that the circuit court abused its power and exceeded it legitimate authority in denying Medical Assurance's motion to dismiss. Because writs of prohibition are not granted under law in West Virginia where it does not clearly appear that the petitioner is entitled thereto, *Fisher v. Bouchelle*, 134 W.Va. 333, 61 S.E.2d 305 (1950); *Sidney C. Smith Corp. v. Dailey*, 136 W.Va. 380, 67 S.E.2d 523 (1950); and *State ex rel. Maynard v. Bronson*, 167 W.Va. 35, 277 S.E.2d 718 (1981), the West Virginia Supreme Court of Appeals properly found that prohibition did not lie. Accordingly, as there is no compelling reason to grant Medical Assurance's Petition for Writ of Certiorari, the same should be denied.

Respectfully submitted,
EVANGELINE C. PIZARRA, M.D.,
Respondent

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APPENDIX TABLE OF CONTENTS

Page

Order Granting
Partial Summary Judgment
entered May 13, 2002 ..... App.1

IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

EVANGELINE C. PIZARRO, M.D.	:
	:
Plaintiff,	:
	:
vs. Civil Action No. 00-C-1489(G)	
	:
MEDICAL ASSURANCE OF WEST VIRGINIA, INC., and COLOMBO & STUHR, PLLC	:
	:
Defendants.	:

Entered: May 13, 2002

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This day came the parties, above-named, by their counsel for a hearing upon plaintiff's Motion for Partial Summary Judgment.

WHEREUPON, the Court considered the motion, memoranda filed in connection with said motion, argument of counsel and materials made of record in this matter including the pleadings and evidence before it and in accordance with the provisions of Rule 56(d) does accordingly find that the following material facts exist without substantial controversy:

(1) That the plaintiff, Evangeline C. Pizarro, M.D. is a named insured under a medical professional liability policy issued by the defendant, Medical Assurance of West Virginia, Inc. (hereinafter "Medical Assurance") which policy contains a limit of liability in the amount of $1,000,000.

(2) That on December 30, 1998, Delores and Ralph Young filed a medical malpractice action against Dr.

Pizarro and others in the Court of Common Pleas of Belmont County, Ohio (hereinafter "the underlying action").

(3) That the action against Dr. Pizarro was premised upon her alleged failure to diagnose Mrs. Young's rectal cancer which resulted in the development of multiple tumors in her rectum and an eventual surgery for the establishment of a permanent colostomy.

(4) That following the institution of the underlying action, Medical Assurance retained the services of the Morgantown, West Virginia law firm of Columbo and Stuhr, PLLC for purposes of representing the interests of Dr. Pizarro.

(5) That the underlying action against Dr. Pizarro proceeded to trial on August 22, 2000 and following four days of trial by jury, a verdict for compensatory damages totaling $7,500,000 was entered against Dr. Pizarro and the clinic.

(6) That the trial court gave the defendants credit for a $250,000 settlement made with another co-defendant prior to trial and entered a judgment in the amount of $7,250,000 against Dr. Pizarro and her co-defendant together with post-judgment interest at the rate of 10% per annum from August 25, 2000 until paid.

(7) That following the verdict, the trial court denied Dr. Pizarro's motion for new trial and all other substantive post-verdict motions filed on her behalf; while granting the co-defendant clinic's motion for a directed verdict on its cross claim for indemnification against Dr. Pizarro.

(8) That upon its determination that Dr. Pizarro's representatives failed to make a good faith effort to settle the case, the trial court in the underlying action granted the Young's motion for pre-judgment interest as provided for at O.R.C. 1343.03(C).

(9) That following the entry of the excess verdict, Dr. Pizarro retained Patrick S. Cassidy, Esq., Wray V.

Voegelin, Esq., and Cassidy, Myers, Cogan, Voegelin and Tennant, L.C. to represent her personal interests.

(10) That despite said counsels' request for Medical Assurance to indemnify Dr. Pizarro against any personal liability arising out of the excess judgment, Medical Assurance refused to indemnify Dr. Pizarro for any sum in excess of the one million dollars of coverage afforded under her professional liability policy.

(11) That following the entry of the judgment against Dr. Pizarro, Medical Assurance retained counsel on Dr. Pizarro's behalf to prosecute an appeal from such judgment; and said appeal is currently pending in the Court of Appeals of the 7th Appellate District in Ohio.

(12) That following Medical Assurance's refusal to indemnify Dr. Pizarro from any personal liability arising out of the excess judgment entered against her in the underlying action, Dr. Pizarro instituted the instant proceedings against Medical Assurance and the attorneys which it retained on her behalf.

(13) That in filing a *Shamblin* action under the circumstances of this case a plaintiff seeks to accomplish two goals: first, to be relieved of personal liability for the excess judgment which was rendered in the underlying action irrespective of liability limitation contained in the medical professional liability policy; and second, to obtain compensation for the other damages arising out of the alleged bad faith handling of the underlying action.

(14) That Medical Assurance failed to settle the underlying action within policy limits when there existed an opportunity to settle and when such settlement within policy limits would have released Dr. Pizarro from any and all personal liability

(15) That by correspondence under date of March 12, 2002 counsel for Medical Assurance advised counsel for Dr. Pizarro that Medical Assurance was willing to indemnify Dr. Pizarro for any and all damages or other

relief awarded against her with respect to the August 25, 2000 jury verdict entered in the underlying action.

(16) That based upon Medical Assurance's agreement to indemnify Dr. Pizarro, plaintiff has accomplished the objective of this litigation related to her request to be relieved of any personal liability for any judgment rendered against her in the underlying action irrespective of the liability limitation contained in her medical professional liability policy.

Based on the foregoing uncontested facts the Court doth

ORDER and ADJUDGE that plaintiff has prevailed with regard to her *Shamblin* action for bad faith against Medical Assurance designed to relieve her of any personal liability for any judgment ultimately rendered against her in the underlying action irrespective of the liability limitation contained in the subject medical professional liability policy.

WHEREUPON, the Court observed that Medical Assurance's aforesaid agreement to indemnify plaintiff does not permit this Court to fully adjudicate this action under Rule 56 as there remains material facts which are actually and in good faith controverted. Accordingly, pursuant to the provisions of Rule 56(f) the Court finds that at this point in the litigation process and at this stage of the discovery process genuine issues of material fact exist with regard to plaintiff's action against Medical Assurance:

1. Whether Medical Assurance's handling of the underlying action was violative of the West Virginia Unfair Trade Practices Act as provided for at *W.Va. Code*, 33-11-1 et. seq.

2. The amount of Dr. Pizarro's reasonable attorneys' fees in vindicating her *Shamblin* claim.

3. Whether Dr. Pizarro has sustained damages for net economic loss caused by Medical Assurance's bad

faith in the handling of the underlying action; and, if so, the amount of such damages.

4. Whether Dr. Pizarro has sustained damages for aggravation, inconvenience and emotional distress; and, if so, the amount of such damages.

5. Whether Medical Assurance's handling of the underlying action was accompanied by actual malice.

WHEREUPON, the Court observed that because plaintiff's motion for partial summary judgment applied only to her action against the defendant, Medical Assurance, this Order shall be limited to such action; and this Order is not intended to embrace any aspect of plaintiff's action against the defendant law firm.

Medical Assurance's objection and exception to the foregoing rulings of the Court shall be and are hereby saved.

Dated this 13th day of May, 2002.

/s/
Honorable Martin J. Gaughan, Judge

SEEN AND APPROVED BY:

/s/
Of Counsel for Plaintiff

/s/
Of Counsel for Medical Assurance of West Virginia, Inc.

/s/
Of Counsel for Colombo & Stuhr, PLLC

(3)

No. 01-1578

Supreme Court, U.S.
FILED
JUN 18 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MEDICAL ASSURANCE OF WEST VIRGINIA, INC.,
Petitioner,

v.

EVANGELINE C. PIZARRO, M.D.; COLUMBO AND STUHR, P.L.L.C.,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

REPLY TO BRIEF IN OPPOSITION

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60pg

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION 1

I. A Justiciable Controversy Remains Notwithstanding Medical Assurance of West Virginia, Inc.'s Agreement to Indemnify Evangeline C. Pizarro Any Excess Verdict in the Ohio Action 1

CONCLUSION 2

TABLE OF AUTHORITIES

Page

Case:

Shamblin v. Nationwide Mut. Ins. Co.,
153 W.Va. 585, 396 S.E.2d 766 (1990) 1

Statutes:

9 U.S.C. § 1, et. seq 2

W.Va. Code § 33-11-1 et. seq 2

REPLY TO BRIEF IN OPPOSITION

I. A Justiciable Controversy Remains Notwithstanding Medical Assurance of West Virginia, Inc.'s Agreement to Indemnify Evangeline C. Pizarro Any Excess Verdict in the Ohio Action.

Medical Assurance of West Virginia, Inc. ["Medical Assurance's"] acknowledges that it has agreed to indemnify Evangeline C. Pizarro, M.D. ["Dr. Pizarro"] for all damages or other relief awarded against her with respect to the August 25, 2000 jury verdict rendered in the Court of Common Pleas of Belmont County, Ohio, including any amounts in excess of her policy limits. *See*, Respondent's Brief, p. 6. This agreement does not, however, negate the existence of a justiciable controversy between the parties, which must be submitted to arbitration pursuant to the parties' insurance contract.

Following Medical Assurance's agreement to indemnify Dr. Pizarro for excess damages, Dr. Pizarro filed a Motion for Partial Summary Judgment in the Circuit Court of Ohio County. By Order dated May 13, 2002, the Circuit Court of Ohio County granted Dr. Pizarro's Motion for Partial Summary Judgment, finding that Medical Assurance's agreement to indemnify Dr. Pizarro for excess damages resolved one portion of her *Shamblin*[1] claim. App. 4, Respondent's Brief in Opposition. The Circuit Court specifically identified five (5) issues of disputed material facts that must be resolved with respect to Dr. Pizarro's remaining claims against Medical Assurance and retained jurisdiction over Medical Assurance for resolution of those

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[1] In West Virginia, common law bad faith claims are commonly referred to as *Shamblin* claims after the West Virginia Supreme Court of Appeals opinion in *Shamblin v. Nationwide Mut. Ins. Co.*, 153 W.Va. 585, 396 S.E.2d 766 (1990).

issues and claims. App. 4-5, Respondent's Brief in Opposition.

Medical Assurance's agreement to indemnify Dr. Pizarro resolves only one portion of her *Shamblin* claim. The issues of whether Dr. Pizarro may recover compensatory damages for her alleged aggravation, inconvenience and emotional distress, net economic loss, punitive damages, and attorney fees remain pending. Moreover, Medical Assurance's agreement to indemnify Dr. Pizarro for any excess verdict does not resolve her claims for alleged violation of the West Virginia Unfair Trade Practices Act, *W.Va. Code § 33-11-1 et. seq.*

The Circuit Court of Ohio County West Virginia exceeded it legitimate authority by retaining jurisdiction over Dr. Pizarro's claims, entertaining Dr. Pizarro's Motion for Partial Summary Judgment, entering an Order Granting Partial Summary Judgment in favor of Dr. Pizarro regarding the indemnification issue and continuing to exercise jurisdiction over Dr. Pizarro's remaining claims despite the valid arbitration agreement contained within a contract of insurance between the parties. The circuit court further erred by invoking a previously unarticulated state public policy against arbitration provisions in insurance contracts to invalidate the arbitration agreement and refusing to enforce the arbitration agreement as required under the Federal Arbitration Act, *9 U.S.C. § 1, et. seq.*

CONCLUSION

WHEREFORE, Medical Assurance of West Virginia, Inc. respectfully requests that a Writ of Certiorari be issued and this Court accept review of this matter.

Respectfully submitted,
By Counsel

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